86-1578

No. _____

In The

Supreme Court of the United States

October Term, 1986

JAMES BURKE,
by and through his next Friend, Betty Draves,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and UAW LOCAL 652,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

Petitioner's mental illness caused him to violate a company work rule prohibiting bringing a weapon onto company premises and resulted in his discharge. Respondent unions' representatives withdrew the grievance of petitioner's discharge after determining his mental condition to be irrelevant to the work rule violation. The union representatives also made no effort to enforce the disability benefits provisions of the governing labor contract. As a result, petitioner lost both his job and disability benefits.

The questions presented include:

I.

WHETHER A UNION CAN DISREGARD A MEMBER'S MENTAL ILLNESS, THE SOLE CAUSE OF CONDUCT RESULTING IN DISCHARGE, AND STILL SATISFY ITS DUTY OF FAIR REPRESENTATION?

II.

WHETHER AN EMPLOYER AND A UNION HAVE AN AFFIRMATIVE DUTY TO MENTALLY ILL EMPLOYEES TO ENFORCE THE DISABILITY INSURANCE PROVISIONS OF A GOVERNING LABOR CONTRACT?

III.

WHETHER AN EMPLOYER'S AND UNION'S FAILURE TO ACKNOWLEDGE AN EMPLOYEE'S MENTAL DISABILITY CONSTITUTES INVIDIOUS DISCRIMINATION?

IV.

WHETHER A UNION MEMBER IS ENTITLED TO A JURY TRIAL ON THE CLAIM OF BREACH OF FAIR REPRESENTATION?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, James Burke, by his next friend, Betty Draves and the respondents, General Motors Corporation, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and UAW Local 652.

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, James Burke, by and through his next Friend, Betty Draves, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on December 29, 1986.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Sixth Circuit was not published and is reprinted in the appendix hereto, pg. A-1, *infra*.

The opinion of the United States District Court for the Western District of Michigan, Southern Division (Gibson,

D. J.) has not been reported. It is reprinted in the appendix hereto, pg. B-1, *infra*.

JURISDICTION

Invoking federal jurisdiction under 29 USC 141 *et seq.*, the petitioner brought this suit in the Western District of Michigan. On January 15, 1986, the Western District granted summary judgment on the respondents' motions for summary judgment. See pg. C-1, *infra*.

On petitioner's appeal, the Sixth Circuit on December 29, 1986, entered a judgment and an opinion affirming the Western District's summary judgment directing that petitioner's complaint be dismissed for the reason set forth in the opinion of the Western District Judge that Plaintiff had failed to state a claim for a breach of the duty of fair representation. See pg. A-2, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 USC 1254(1).

STATUTE INVOLVED

29 USC 159(a). Exclusive power to represent all employees in a bargaining unit.

Although the duty of fair representation is not explicitly found in the National Labor Relations Act, it has been implied from the grant to the union by Section 9(a) of that act of exclusive power to represent all employees in the bargaining unit.

STATEMENT OF THE CASE

James Burke was fired from his job as a result of his shooting a co-employee in the parking lot of a General

Motors Oldsmobile plant in Lansing, Michigan on April 16, 1982. Mr. Burke had been a long-time employee (over 15 years) for General Motors Corporation and a member of UAW Local 652, associated with International UAW. Within the year preceding the shooting incident, petitioner had been treated for psychological problems and had been granted an extended sick leave by his employer. He had also displayed anti-social conduct while at work and had been suspended for fighting within two months preceding the shooting. Mr. Burke later related the shooting incident to his shop committeeman and a written summary of his statement became an attachment to the Local 652 Grievance Fact Sheet:

> "James C. Burke states the reason he had a weapon on company premises was that he feared for his life, that someone at the shop was going to kill him. *He only put the weapon in his car when he felt this strong fear for his life.*" (emp. supp.)

On the backside (or following page) of the form, the summary continued:

> "J. Burke said about two years ago Sept. he and his wife split up. Shortly after that *he had* a *breakdown* (didn't say what kind) it was about that time when he had a blowup at the shop threatening supervisors. He went on sick leave for a short time. He did not personally know R. Hodge. *He felt through eye contact* with R. Hodge *that Hodge was out to get him*. This feeling slowly built to the point that he had to do something about it. Leading to the incident in the parking lot. Statement by J. Burke on discipline was 'I'm sorry for what happened.'" (Some emphasis and capitalization changed)

On the Local 652 Grievance Fact Sheet itself, dated June 11, 1982, union representative Kenneth Smith noted that

petitioner's supervisor had represented: *"The employee is a mental case."*

Two and one-half years later, in his October 22, 1985 deposition, Mr. Burke was asked to describe his mental condition at the time of the shooting until his criminal trial.

> "My mind was not functioning properly. I didn't have control of my faculties . . ." (pg. 29 of Deposition)
>
> "That's something that had to be done that day. That's all there is to it. I felt that it had to do with my feelings of persecution since 1978 to 1982 from some employees and some supervisors." (pg. 31 of Deposition)
>
> ". . . I had a big criminatl [*sic*] trial against me. I felt persecuted by people at Oldsmobile. I had great anger day and night, and I seen visions of my angry, persecuted face on the floor, ceiling, walls. It was called — my condition was called delusions of persecution. And I didn't eat much, I didn't sleep much. I didn't keep myself clean. I only thought about my trial coming up and these people that I thought mistreated me. . . ." (pg. 19 of Deposition)

Among his employment benefits, petitioner was to have been provided insurance coverage which included payment of lump sum and/or periodic payments in the event he became disabled.

Significant mental, as well as physical, illness was a recognized and accepted reason for determining a person "disabled." Paragraph 106 of the collective bargaining agreement between GM and the UAW stated:

> "Any employe who is known to be ill supported by satisfactory evidence, will be granted sick leave automatically for the period of continuing disability."

Nonetheless, sick leave for reasons of mental illness was never granted to the petitioner. Instead, GM indefinitely suspended Mr. Burke in June, 1982 after sending two representatives to see Mr. Burke in jail. A UAW district committeeman, assigned by the shop committeeman, accompanied the employer's representatives and had Mr. Burke sign a blank grievance form. Mr. Burke was suspended and later discharged for bringing a weapon onto company premises.

Ordinarily, according to the shop committeeman, some investigation was done by both the shop committeeman and the district committeeman in pursuing a grievance. There was nothing done to investigate the shooting incident at the time it occurred and neither the shop committeeman nor the district committeeman knew petitioner personally. Union representatives did not advise Mr. Burke immediately after the incident, did not talk with the police nor with a knowledgeable company security investigator about the incident, did not contact any friends of Mr. Burke, did not know where Mr. Burke had lived at the time of the shooting incident and, in the shop committeeman's opinion, had no reason to find out where he lived. The union representatives did not do anything to verify that Mr. Burke was mentally ill even though it had come to their attention that the petitioner suffered from mental illness. Mr. Burke was not sent to a physician and the company was not asked to evaluate him, though it could have under the labor contract.

The union representative did not ask to delay consideration of the grievance until after the criminal trial although delay was a possible alternative. He never distinguished Mr. Burke's right to obtain benefits from the company's right to prevent him from returning to the premises. The *UAW considered Mr. Burke "guilty as charged"*

and therefore susceptible to dismissal irrespective of his mental condition.

The shop committeeman considered *Mr. Burke's case as an unusual one but handled it just like a standard grievance.* The shop committeeman knew of no customary procedure that the union followed when it learned that one of its employees had been seriously injured. He suggested that it was the responsibility of General Motors to assure an employee's receipt of benefits when the employee could no longer take care of his own affairs but admitted that there were Benefit Representatives working for the UAW who were responsible for gaining an employee's medical and long-term disability benefits. He suggested that it was the employee's responsibility to contact the Benefit Representative ~~but did~~ not know how the Benefit Representative was supposed to act in a situation where an employee was unable to act on his own behalf.

Although he signed a blank grievance form, Mr. Burke was never informed of the various contacts between the UAW and GM. Mr. Burke's grievance was withdrawn on July 30, 1982, but the Local never sent any communication to Mr. Burke.

On September 30, 1982, *Mr. Burke was found not guilty by reason of insanity* on the criminal charges brought against him as a result of the April shooting. He was referred to the Center for Forensic Psychiatry and later determined by the Ingham County Probate Court to be a mentally ill person. *He was* treated by and *directed to remain in the custody of the Center for Forensic Psychiatry until May 30, 1985,* at which time it was determined that his mental illness was in remission but that his judgment remained partially impaired, requiring outpatient psychiatric treatment.

The District Judge described this suit as a "somewhat unusual discharge case" and remarked at page 4 of his opinion:

> "None of the parties seriously contests Plaintiff's assertion that, but for his mental illness, he would not have committed the assault on his co-worker."

The court went on to summarize what is perceived to be the petitioner's major allegations and reached three significant conclusions:

1. The union failed to raise the argument during the grievance proceedings that petitioner was mentally unstable and could not be held responsible for his action;

2. Even if the aforementioned argument may have been successful if raised, the failure of the union to pursue this strategy was at most mere negligence insufficient to establish a breach of the duty of fair representation and;

3. The union had no affirmative duties to raise the issue of mental illness or to have petitioner placed on disabled status immediately after the shooting incident.

The court then reasoned that because the petitioner failed to state a claim against the union, the exhaustion requirement remained in full force and petitioner failed to exhaust his contractual remedies. Therefore, the breach of contract claim was dismissed. Petitioner's handicap discrimination claim was then dismissed because he failed to exhaust his administrative remedies and the court considered itself unable to exercise jurisdiction over the remaining pendent state law claims.

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT'S SANCTIONING OF A UNION'S ABANDONMENT OF A GRIEVANCE PROTESTING THE DISCHARGE OF A MENTALLY ILL EMPLOYEE FOR CONDUCT BROUGHT ABOUT BY THE EMPLOYEE'S MENTAL ILLNESS CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT, OTHER CIRCUITS AND STATE AND FEDERAL LEGISLATION.

The Sixth Circuit has sanctioned arbitrary abandonment of grievances protesting the discharge of mentally ill employees. By allowing a union to treat as "irrelevant" the insane delusions of an employee which caused him to violate an employer's work rule, the lower court has encouraged discrimination against the mentally handicapped and repudiated the meaning of fair representation as defined by this Court.

Vaca v. *Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d. 842 (1967), spelled out a union's duty of fair representation and the applicable substantive standards to be applied, saying in part:

> "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190

In decisions before and after *Vaca*, this Court provided broad guidelines for the interpretation of the duty of fair representation and has allowed lower courts to flesh out those guidelines and apply them to particular cases. The Sixth Circuit's decision in this cause rejects the guidelines set forth in *Vaca* and the application of those guidelines by other Circuits.

A clearly conflicting and factually similar case is *Carpenter* v. *West Virginia Flat Glass, Inc.*, 763 F.2d. 622 (1985). There, the Fourth Circuit held that the critical issue for the union and company to resolve was whether the employee should be reinstated and that depended on whether he was physically able to work at the plant. In order to determine its member's health status, the union and employer referred the employee to an agreed-upon third doctor but the doctor omitted from his report any comment about the employee's ability to return to work. The Court held that where the union's representative did nothing to rectify such omission but, instead, acquiesced in the company's decision to discharge the employee, the union processed the employee's grievance in such a perfunctory manner as to act arbitrarily and in breach of its duty of fair representation. The *Carpenter* Court observed that the union's representative either knew or by a reasonable investigation could have learned facts pertinent to the Plaintiff's medical condition and criticized the union's lack of effort:

> "There is no evidence that he [International's representative] consulted Carpenter's doctor to get an up-to-date report in light of Dr. Mills's diagnosis. The representative did not even ask Carpenter whether his condition was the same as it had been when Dr. Wilson [Plaintiff's own doctor] examined him nearly 5 months before. In fact, he never informed Carpenter of Dr. Mills's report." Pg. 625

The contrast in the approach taken and the results achieved by the Fourth and Sixth Circuits is especially evident where the lack of effort by the respondent unions and Mr. Carpenter's union was so similar. In petitioner's case, the trial court observed that none of the parties seriously contested petitioner's assertion that, but for his

mental illness, he would not have committed the assault on his co-worker (pg. B-3), that the Grievance Fact Sheet clearly revealed that petitioner had mental problems (pg. B-5) and that the shop committeeman who ultimately determined that the grievance should be dropped read the Grievance Fact Sheet before determining that petitioner's mental illness was irrelevant to the grievance (pg. B-5). The trial court also found that the union did not raise the argument that, because petitioner was mentally unstable, he could not be held responsible for his actions (pg. B-6). As in *Carpenter*, petitioner's health was the critical issue for the union and the company to resolve in determining whether petitioner should be discharged or determined disabled. The respondent unions' representative did nothing to investigate the petitioner's condition nor raise the obvious defense that petitioner's insane delusions caused him to violate the company's work rule. Like the representative in *Carpenter*, the respondents' representative simply acquiesced in the company's decision to discharge Mr. Burke.

The trial court attempted to justify its holding in part by characterizing the union's conduct as "mere negligence" insufficient to establish a breach of duty of fair representation.

The hasty pigeonholing of petitioner's case as one of "mere negligence" resulted in a gross expansion of the discretion granted to a union. A union acts arbitrarily if it ignores a meritorious grievance or processes it in a perfunctory fashion. *Vaca*, 386 U.S. at 917. The conduct and later explanation by the petitioner of his bringing a gun upon the company's premises (the work rule violation) was so irrational as to alert the most casual observer to a meritorious excuse for Mr. Burke's conduct. Petitioner's mental illness also made him eligible for disability benefits. Most significantly, the petitioner's

insanity was the *only excuse* which could be raised on his behalf as the fact of the shooting was not disputed. The arbitrary rejection of petitioner's illness was not an oversight or the mere negligence suggested in the trial court's authority, *Ruzicka* v. *General Motors Corp.*, 523 F.2d. 306, 310-11 (6th Cir. 1975) or other pertinent caselaw. Indeed, *Ruzicka* supported the notion that a union should be responsible for a total failure to act that is unexplained and unexcused. See also *Robesky* v. *Qantas Empire Airways, Ltd.*, 573 F.2d. 1082 (9th Cir. 1978) and *Foust* v. *IBEW*, 572 F.2d. 710 (10th Cir. 1978). Even an unintentional mistake is arbitrary if it reflects a "reckless disregard" for the rights of the individual employee, especially where the individual interest at stake is strong. *Dutrisac* v. *Caterpillar Tractor Co.*, 749 F.2d. 1270 (9th Cir. 1983).

The Sixth Circuit's seemingly boundless expansion of a union's discretion reflects a lack of historical perspective. The fair representation doctrine originated in the context of racial discrimination, *Steel* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), but non-racial discrimination has also been found, on the basis of union membership, political favoritism, pursuit of a particular trade, sex discrimination and other invidious classifications. See *Jones* v. *TWA, et al*, 495 F.2d. 790 (2d. Cir. 1974); *W. H. Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F.2d. 604 (6th Cir. 1955) cert. den. 350 U.S. 67 (1956); *Ferro* v. *Railway Express*, 296 F.2d. 847 (2d. Cir. 1961); *Farmer* v. *ARA Services*, 660 F.2d. 1096 (6th Cir. 1961); and *Smith* v. *Hussman Refrigerator Co.*, 619 F.2d. 1299 (8th Cir. 1980).

In more recent times, age discrimination and discrimination against handicapped persons have been identified as forms of invidious discrimination which society

should discourage. The Michigan Handicappers Civil Rights Act, MCL 37.1201 *et seq.*, and the Federal Rehabilitation Act of 1973, 29 USC 701 at 793 are but two legislative responses to increased societal recognition that handicapped persons are entitled to equal protection under the law and that affirmative conduct, as well as the absence of discriminatory conduct, must be undertaken so as to prevent discriminatory treatment of the handicapped.

> "A labor organization shall not:
>
> * * *
>
> (d) Fail to fairly and adequately represent a member in a grievance process because of the member's handicap." MCL 37.1204(d)

Mentally afflicted persons are doubly vulnerable to harm when the legislative policies are not enforced because the handicap itself impairs reasoning and, consequently, the afflicted person's capability to pursue enforcement of the law. Many individual members of the public do not take seriously the claims and complaints of mentally ill persons and are often reluctant to exercise the patience required to pursue the rights of the mentally afflicted.

Thus, the Sixth Circuit's decision to allow carte blanche rejection of mental illness as a relevant factor which a union must take into account as part of its duty of fair representation conflicts with longstanding anti-discriminatory labor policy set forth by this Court and more recent federal and state legislation encouraging vigilant protection of the rights of the handicapped.

The trial court also created a new rule of law in holding that a union had no duty to secure a member's disability benefits. The trial judge reasoned that the petitioner had

failed to show evidence that the union held such an "affirmative" duty. There is no authority for the proposition that the duty of fair representation does not include affirmative conduct. It is not limited to execution of a collective bargaining agreement and applies as well to the *enforcement* of such agreements, *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d. 80 (1957). Securing benefits to which disabled employees are entitled but unable to gain for themselves is part of a union's enforcement obligation and cannot be preemptorily eliminated as part of that obligation, especially where failure to secure the benefits prejudices a particular class, *i.e.*, the mentally handicapped. The lower court's decision to the contrary has no legal foundation. Permitting unions to benignly neglect, deliberately ignore or arbitrarily reject mental illness, especially where mental illness is the cause of a member's conduct resulting in discharge, so departs from the fundamental purpose of fair representation as to require immediate review by this Court.

II.

THE DECISION BELOW THAT A UNION MAY IGNORE A MEMBER'S MENTAL ILLNESS AND YET FULFILL ITS DUTY OF FAIR REPRESENTATION RAISES IMPORTANT AND UNRESOLVED QUESTIONS.

The Sixth Circuit has defined a union's obligation as if the duty of fair representation were isolated from and unrelated to anti-handicap discrimination legislation. Significant questions are raised whether the duty of fair representation must incorporate the specific obligations and general spirit of state and/or federal handicap legislation and whether a failure to acknowledge mental disability is a form of discrimination.

The lower court never addressed the question whether a disparate impact would result to the mentally ill if

unions were allowed to ignore mental illness as an important circumstance to a member's employment benefits or grievance rights. The court implied that so long as a union did not engage in affirmative discriminatory conduct its failure to act on behalf of a mentally impaired member created no conflict with anti-discrimination policies nor a breach of its duty of fair representation.

There is no question that the respondents would have committed a wrong against the petitioner if he had manifested his disability outside the work place and was then fired without the grant of his disability insurance benefits because of his mental illness. The act of commission (termination) would be plain. *Query,* then, would a union's failure to acknowledge a member's mental illness be discrimination? Though it is an act of omission rather than commission, the discrimination seems no less plain. Resolution of the issue takes on increased importance as an entire class, *i.e.,* all union employees who have or may in the future suffer mental illness, may be affected and where the consequences of a union's failure to consider members' mental impairments may result in the loss of the afflicted employees' best and perhaps only employment or the protection of insurance/compensation programs created for the purpose of reducing the economic consequences of disability.

But there is no holding from this Court specifically defining the duty of fair representation as owed to the mentally handicapped.

It would make little sense to provide protection to an individual that stopped when he entered his employer's premises. It would make less sense to provide protection to union members less than that enjoyed by non-union employees. Yet, the logical extension of the Sixth Circuit's rule would have such results. A non-unionized

employer is bound by anti-handicap discrimination legislation. Ignoring a person's handicap so as to prevent him from enjoying disability benefits would be no less an act of discrimination than denying the person employment because of a handicap unrelated to his ability to perform the job. Nonetheless, the Sixth Circuit's rule would excuse a union's acquiescence to an employee's discharge for conduct which was a manifestation of the employee's mental illness.

As noted in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 47 L.Ed.2d. 231, 96 S.Ct. 1048 (1978), there is imposed upon a bargaining agent a responsibility equal in scope to its authority; the duty of fair representation serves as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. The mentally handicapped are stripped of all forms of redress when the illness is so complete as to make them irrational and their bargaining agent refuses to acknowledge the impairment or treat it as pertinent to the members' employment benefits.

III.

THE SIXTH CIRCUIT DEPARTED FROM ACCEPTED PRACTICE IN GRANTING SUMMARY JUDGMENT WHERE THE INTENT OF THE RESPONDENTS WAS DISPUTED AND IN DEPRIVING PETITIONER A JURY TRIAL.

The Sixth Circuit permitted summary judgment to the respondents without giving petitioner a fair opportunity to challenge the motivation of the employer and the unions. Although the sequence and nature of the events were mostly undisputed, the underlying motivation of the respondents was not. Petitioner claimed that the respondents deliberately ignored his mental illness so as to avoid the issue of mental disability and thereby

quickly dispose of his grievance. The Sixth Circuit failed to examine the trial court's disregard for Mr. Burke's claims and its deprivation of his right to a jury trial.

Despite acknowledging that the inferences to be drawn from the underlying facts must be viewed in a light most favorable to the party opposing a summary judgment motion,[1] the trial court disregarded the strong circumstantial evidence indicating deliberate disregard of petitioner's employment rights. The employer had chosen not to charge petitioner with assault on a co-employee as the grounds for his discharge. It instead cited him only for bringing a weapon onto company premises. A fair inference of this fact was that the employer wished to limit its charge so it could sidestep the issue of petitioner's mental disability. The union representatives also failed to raise the issue and, it could be inferred, tacitly agreed with the employer's strategy so as to rid themselves of the grievance and petitioner as a union member. There were other undisputed facts which supported petitioner's allegation that the respondents deliberately ignored his mental impairment.

Paragraph 106 of the collective bargaining agreement stated:

> "Any employee who is known to be ill supported by satisfactory evidence, will be granted sick leave *automatically* for the period of continuing disability." (emp. supp.)

The automatic grant of sick leave to an employee known to be ill for a period of continuing disability was a provision not only incorporated in the collective bargaining agreement but a concept adopted by the union in its

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[1] The trial court relied on *U.S.* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), and *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d. 425 (6th Cir. 1962).

constitution. The union constitution required a member to file for out of work credits when not regularly employed. In Section 20 of Article XVI of the union constitution, the union further provided:

> "Any member becoming out of work because of illness or injury shall be exempt from the above section. Such member shall be automatically exonerated from the payment of dues and shall be issued 'out of work' credits provided good and sufficient proof is submitted to substantiate illness or injury. . . ." (emp. supp.)

Not only did the union and employer fail to automatically grant Mr. Burke's sick leave, but the union subsequently dismissed Mr. Burke as a member despite the ample evidence that he was out of work because of serious illness.

Coupled with the abandonment of the grievance after its very first stage (after having petitioner sign a blank grievance form) and without completing any significant investigation or even raising a question about petitioner's disability, the respondents' failure to honor contract and constitutional safeguards provided abundant evidence from which a trier of fact could infer deliberate indifference to or reckless disregard of petitioner's contract rights as well as purposeful discrimination.

A jury trial was consequently denied to the petitioner contrary to accepted practice. *Minnis* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, et al*, 531 F.2d. 850 (8th Cir. 1975); *Cox* v. *Masland & Sons*, 607 F.2d. 138 (5th Cir. 1979) rehearing den. (1980); and *Kinzel* v. *Allied Supermarkets*, 88 F.R.D. 360 (E.D. Mich. 1980).

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Petitioner has presented question IV (Reason III), not as a reason for granting certiorari, but because this is the only opportunity for petitioner to seek review of the ultimate ruling of the Sixth Circuit that the petitioner's complaint should be dismissed for failure to state a claim establishing breach of fair representation and the consequent dismissal of the breach of contract and pendent state law claims. If the petitioner is correct in urging that the Sixth Circuit misinterpreted and/or misapplied the standards by which the duty of fair representation must be measured, the Court should reverse the lower court or the matter should be remanded with instructions for appropriate disposition.

Respectfully submitted,

PROFESSIONAL LAW OFFICES OF
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Dated: March 26, 1987

APPENDICES

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APPENDIX A

MEMORANDUM DECISION

(United States Court of Appeals for the Sixth Circuit)

(Filed December 29, 1986 — John P. Hehman, Clerk)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

(JAMES BURKE, BY AND THROUGH HIS NEXT FRIEND, BETTY DRAVES, Plaintiff-Appellant, v. GENERAL MOTORS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE, ÆROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and UAW LOCAL 652, Defendants-Appellees — On Appeal from the United States District Court for the Western District of Michigan; No. 86-1147)

Before: **ENGEL, KRUPANSKY** and **NELSON**, Circuit Judges.

PER CURIAM *NOT FOR PUBLICATION*

Plaintiff appeals a summary judgment in his hybrid action for breach of the duty of fair representation and for breach of a collective bargaining agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

Plaintiff shot a co-worker at work in April 1982. The police arrived on the scene and shot plaintiff. As a result of this incident plaintiff was fired in July 1982 for having a weapon on company premises, which General Motors

prohibits. Plaintiff was later tried for assault with intent to murder and was found not guilty by reason of insanity. Plaintiff received sick leave benefits while he recuperated from his gunshot wounds.

The union filed a grievance on plaintiff's behalf. The company denied the grievance at the first step, and the union decided not to pursue the grievance further. The union did not inform plaintiff that his grievance had been denied.

Plaintiff alleged in the district court that the union breached its duty of fair representation by failing to argue on his behalf that his insanity excused his violation of the rule against weapons. Plaintiff also alleged that the union breached its duty by taking plaintiff's signature on a blank grievance form and by failing to inform him that the company denied the grievance. Finally, he asserts that the union should have gotten him disability benefits because of his mental condition.

Upon a review of the record as a whole we agree with the district court in its determination that the union did not breach its duty of good-faith representation under the unusual circumstances of this case. For this reason and for the other reasons set forth in the careful opinion of United States District Judge Benjamin F. Gibson filed in the district court on January 15, 1986, the judgment of the district court is AFFIRMED.

APPENDIX B

OPINION

(United States District Court —
Western District of Michigan — Southern Division)

(Filed January 15, 1986)

(JAMES BURKE, by and through his Next Friend, BETTY DRAVES, Plaintiffs, v. GENERAL MOTORS CORPORATION, et al., Defendants — File No. G85-239 CA)

This action comes before the Court on defendants' motions for summary judgment. Plaintiff filed briefs in opposition to defendants' motions.[1] Having considered the briefs and having heard oral argument on the points raised therein, the Court hereby finds in favor of defendants and dismisses this action.

Plaintiff's complaint arises out of the termination of his employment by General Motors. Count I asserts a breach of contract claim against General Motors pursuant to section 301 of the Labor Management Relations Act. Count II alleges that defendant unions, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (International Union) and the United Auto Workers Local 652 (Local 652), breached their duty of fair representation. In Count III, plaintiff alleges that all defendants violated federal and state laws prohibiting discrimination against handicapped persons. 29 U.S.C. § 791 *et seq.*; Mich. Comp.

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[1] The Court has treated plaintiff's "Motion in Limine," filed July 2, 1985, as a brief in opposition to defendants' motions.

[N.B.: *The original copy to this opinion does not reference footnote 2; it is included here only as a convenience.*]

[2] Although General Motors did not file a motion specifically moving for dismissal for failure to exhaust, it included arguments on that point in its responsive briefs and on oral argument.

Laws Ann. § 37.1103 *et seq.* Count IV charges all defendants with intentional infliction of emotional distress.

COUNT II — DUTY OF FAIR REPRESENTATION

Defendant unions have moved for summary judgment on Count II, among other grounds, on the grounds that plaintiff has failed to state a claim. To warrant the grant of summary judgment, the moving party bears the burden of establishing the non-existence of any genuine issue of fact that is material to a judgment in his favor. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 (1970); *United States* v. *Articles of Device . . . Diapulse*, 527 F.2d 1008, 1011 (6th Cir. 1976). In determining whether or not there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained in the affidavits, attached exhibits, and depositions must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bohn Aluminum & Brass Corp.* v. *Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). Even if the basic facts are not disputed summary judgment may be inappropriate when contradictory inferences may be drawn from them. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *E.E.O.C.* v. *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 189*, 427 F.2d 1091, 1093 (6th Cir. 1970).

As the unions correctly recite, to prevail on Count II at trial, plaintiff would have to prove that the unions acted arbitrarily, discriminatorily, or in bad faith. *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Ruzicka* v. *General Motors*, 649 F.2d 1207, 1209 (6th Cir. 1981). Defendants argue that plaintiff has failed to allege specific conduct of the unions that violated this standard. As the unions note, general conclusory allegations, without supporting facts, are not sufficient to defeat a motion for summary judg-

ment. *Whitten* v. *Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975), *cert. denied*, 425 U.S. 981 (1976); *Balowski* v. *UAW*, 372 F.2d 829, 835 (6th Cir. 1967). Thus, the Court must carefully examine the record to determine whether plaintiff has raised any material issues of fact tending to show that the unions acted arbitrarily, discriminatorily, or in bad faith in this matter.

In order to understand plaintiff's theory on this count, the Court must initially look at the facts establishing the background of this somewhat unusual discharge case. The record shows that plaintiff was employed by General Motors for approximately 15 years. In 1980 and 1981, plaintiff suffered some emotional problems. In May of 1981, he was hospitalized for a short period of time due to those problems. He was kept off work by his physician and spent two months on disability before returning in July of 1981.

On April 16, 1982, plaintiff shot and injured a co-employee with a shotgun in General Motor's parking lot. Plaintiff himself was shot and seriously injured by police officers who came to the scene. Plaintiff was ultimately tried on charges of assault with intent to murder. Judge Jack W. Warren found plaintiff not guilty by reason of insanity and committed him to the Center of Forensic Psychiatry for psychiatric studies. Plaintiff was ultimately institutionalized there for a period of nearly two and one half years. None of the parties seriously contests plaintiff's assertion that, but for his mental illness, he would not have committed the assault on his co-worker.

On June 11, 1982, General Motors indefinitely suspended plaintiff from his employment. On July 14, 1982, he was discharged. The grounds stated for the discharge

were that plaintiff violated the work rule which prohibited bringing weapons onto company property.

On June 11, a grievance was filed on plaintiff's behalf protesting the indefinite suspension. Plaintiff's signature is on the grievance. It appears, however, that plaintiff signed the grievance form in blank when a union district committeeman, Ken Smith, accompanied two General Motors employees who went out to the Ingham County Jail to give plaintiff notice of his suspension. Smith then filled in the form and filed the grievance. Smith investigated the facts of the case and took it to Step One of the grievance procedure, a meeting with plaintiff's immediate supervisor. The grievance was denied at Step One.

Smith then turned the grievance over to Jim Sickles, the shop committeeman responsible for handling the grievance at Step Two. Sickles discussed the grievance with the chairman of the Shop Committee, with a representative from the union's Detroit Office, and with a representative from the International Union before recommending to the Shop Committee that the grievance be withdrawn because it was unwinnable. The Committee accepted Sickles' recommendation and the grievance was withdrawn on July 30, 1982.

Plaintiff contends that defendant unions breached their duty to fairly represent him by treating his case in an arbitrary and perfunctory manner.[3] From plaintiff's briefs and oral argument, the Court has distilled his major allegations of unfair representation to be that

1) the local union knew that plaintiff suffered from a mental disability, yet failed to treat the case of

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[3] Plaintiff's counsel also appeared to suggest at oral argument that defendants treated his grievance in a discriminatory manner because he was mentally ill. The Court finds nothing in the record to support this argument.

his grievance any differently than an ordinary grievance;

2) the union processed the grievance in an arbitrary manner in that it: a) had the plaintiff sign the grievance form in blank, b) visited him only once during the entire process, c) failed to inform him directly when it withdrew the grievance, and d) failed to inform his wife and mother of available avenues of appeal; and

3) the union failed to take affirmative steps to procure for plaintiff disability benefits and to urge General Motors to treat him as a sick employee entitled to disability, rather than as an employee subject to discharge proceedings.

The Court has carefully examined the record and determined that it does not support a claim based on the first allegation. The Court notes that the grievance fact sheet prepared as a result of Ken Smith's initial investigation clearly reveals that plaintiff had mental problems. Jim Sickles, the shop committeeman who ultimately determined that the grievance should be dropped, read the grievance fact sheet. He determined, however, that whether plaintiff was mentally unstable was irrelevant to the grievance. As he saw it, plaintiff had clearly violated the rule prohibiting employees from carrying weapons onto company property. Sickles believed that, as long as General Motors had proof that plaintiff was seen with the gun, the discharge would be upheld.

Plaintiff suggests that the union could have made the argument that, because plaintiff was mentally unstable, he could not be held responsible for his actions. This, plaintiff suggests, might be a complete defense to the charge that he violated the work rule.

The Court agrees with plaintiff that the union did not raise this argument. Failure to do so, however, is not a breach of the duty of fair representation. Even if this proposed argument would have been successful, something that is far from clear, the failure of the union to pursue this strategy would, at most, be negligence. Mere negligence is insufficient to establish a breach of the duty of fair representation. *See, e.g., Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 310-311 (6th Cir. 1975). In this case, the local union conducted an investigation of the charges, determined they were substantiated by available proofs, consulted with the International union, and ultimately decided to drop the grievance. Given this otherwise thorough investigation, a decision to rely on one theory of the case as opposed to another is not arbitrary. *See Poole* v. *Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983).

With respect to plaintiff's specific charges regarding the handling of the grievance, the Court concludes that these do not rise to the level of a breach of the duty of fair representation. Both plaintiff and Jim Sickles, the shop committeeman, testified in their depositions that it was a common practice to have employees sign blank grievance forms and have the district committeeman fill in the standard grievance language later. Sickles also testified that, after a grievance is filed, the employee is usually not further involved in the process. Thus, it was not unusual that the union did not contact plaintiff further while his grievance was pending. Although it is true that Sickles did not notify plaintiff after deciding to withdraw his grievance, Sickles explained that this was because he did not know where plaintiff was being held at the time. This Court is of the opinion that Sickles should have investigated and found out where plaintiff was. Failure to do so, however, does not constitute a breach of the duty of fair representation. Further,

although Sickles did not tell plaintiff directly, he told plaintiff's wife in August of 1982 that the grievance had been withdrawn. Finally, the Court does not believe the union has an affirmative duty to advise an employee's family members of avenues of intra-union appeal. Neither plaintiff's wife or mother contacted the union to inquire about ways of appealing the decision to drop plaintiff's grievance. Rather, they contacted the union regarding the availability of benefits to plaintiff. The union answered those inquiries by explaining that plaintiff was not entitled to any disability benefits because he was no longer an employee. That advice was accurate. The union cannot be faulted for failing to answer questions that were not asked.

The basis for plaintiff's final allegation that the unions should have assisted him in getting disability benefits is unclear. As the Court understands the argument, plaintiff contends that the unions should have sought to have plaintiff placed on disabled status immediately after the shooting incident. Defendant unions have denied that they had any affirmative obligation to attempt to obtain benefits for plaintiff. Although Jim Sickles testified that there are union benefits representatives who assist employees with disability claims, he stated that those representatives do not act unless they are contacted by an employee or an employee's family. Plaintiff has not offered any contradictory evidence to suggest that the union has an *affirmative* duty to take action when it does not receive inquiries on behalf of the employee.

Having considered all evidence of record, and construed all contradictory evidence in favor of plaintiff, the Court concludes that plaintiff has failed to state a claim for a breach of the duty of fair representation. Although plaintiff has presented evidence suggesting that the local union could have handled plaintiff's grievance differ-

ently, plaintiff has not presented any evidence that the union handled the grievance in the way that it did for reasons that were arbitrary, discriminatory, or in bad faith. Accordingly, Count II is dismissed.

COUNT I — BREACH OF CONTRACT

Defendant General Motors has argued that Count II must be dismissed because plaintiff failed to exhaust his contractual remedies. *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). Plaintiff would have been exempted from the exhaustion requirement if he had shown that his union failed to provide fair representation during the grievance proceedings. *Geddes* v. *Chrysler Corp.*, 608 F.2d 261, 264 (6th Cir. 1979). Because the Court has determined that plaintiff failed to state a claim against the union, the exhaustion requirement remains in full force. Thus, plaintiff's breach of contract claim against General Motors must be dismissed.

COUNT III — HANDICAP DISCRIMINATION

To the extent plaintiff's claims under Count III rely on the Federal Rehabilitation Act, 29 U.S.C. § 701-7961, those claims must be dismissed. As the Sixth Circuit recently held, persons complaining of handicap discrimination in employment must exhaust administrative remedies before availing themselves of the judicial remedies provided by the Rehabilitation Act. *Smith* v. *United States Postal Service*, 747 F.2d 257 (6th Cir. 1984).[4] Plaintiff did not do so in this case.

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[4] The Union also argued that it is not a federal contractor or a federally assisted program subject to the proscriptions of the Act. Because the Court has dismissed Count III on other grounds, it did not reach this argument.

REMAINING STATE LAW CLAIMS

Because the Court has dismissed plaintiff's federal claims, the Court is unable to exercise jurisdiction over the pendent state law claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Counts III and IV must be dismissed.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Dated: January 15, 1986

APPENDIX C

JUDGMENT

(United States District Court —
Western District of Michigan — Southern Division)

(Filed January 15, 1986)

(JAMES BURKE, by and through his Next Friend, BETTY DRAVES, Plaintiffs, v. GENERAL MOTORS CORPORATION, et al., Defendants — File No. G85-239 CA)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 15th day of January, 1986.

PRESENT: HONORABLE BENJAMIN F. GIBSON,
DISTRICT JUDGE

In accordance with the Opinion dated January 15, 1986, IT IS HEREBY ORDERED that the motions for summary judgment filed by defendant unions and defendant General Motors are granted. This action is dismissed.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

(*Certification Omitted*)

No. 86-1578

In The

Supreme Court of the United States

October Term, 1986

JAMES BURKE,
by and through his next Friend, Betty Draves,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and UAW LOCAL 652,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT GENERAL MOTORS CORPORATION OPPOSING PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Petitioner's statement of questions did not accurately reflect either the undisputed facts or the findings and rulings of the District Court or the Court of Appeals.

Petitioner was suspended and discharged from his hourly GM job after he brought a shotgun onto company property, shot a fellow employee, and was in turn shot by police. His discharge was for violation of a GM rule prohibiting bringing a firearm onto company property.

Months later, Petitioner was acquitted of a state criminal assault charge on the grounds of insanity.

Petitioner claims in this case that GM should not have discharged him, and that the union should have arbitrated his discharge, because his mental condition excused an otherwise clear violation of GM's work rules.

The courts below both held that the record contained no facts supporting Petitioner's claim of breach of duty of fair representation by the union.

With this background, Respondent GM restates the questions presented by Petitioner as follows:

I.

WHETHER IT IS A BREACH OF DUTY OF FAIR REPRESENTATION FOR A UNION TO WITHDRAW A DISCHARGE GRIEVANCE WITHOUT RAISING A CLAIM THAT THE EMPLOYEE'S MISCONDUCT SHOULD BE EXCUSED BECAUSE OF MENTAL CONDITION WHERE: (a) THE MISCONDUCT SUPPORTING DISCHARGE IS ADMITTED; (b) THE EMPLOYEE MAKES NO SUCH CLAIM OR REQUEST TO THE UNION; AND (c) THE UNION CONSIDERS THE GRIEVANT'S MENTAL CONDITION BUT CONCLUDES IN GOOD FAITH THAT IT WILL LOSE AN ARBITRATION OF THE CASE.

II.

WHETHER IT IS A BREACH OF DUTY OF FAIR REPRESENTATION FOR A UNION NOT TO AFFIRMATIVELY REQUEST DISABILITY STATUS FOR A DISCHARGED EMPLOYEE WHERE: (a) THE MISCONDUCT SUPPORTING DISCHARGE IS ESTABLISHED; AND (b) THE EMPLOYEE MAKES NO SUCH CLAIM TO THE UNION.

RULE 28.1 STATEMENT

General Motor's non-wholly owned subsidiaries and affiliates are:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Eduador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB — Componentes Automotives S.A. (Brazil)
Fabrica Colombians de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Meghrebires, S.A. (Tunisia)
Industrija Delova Automobils, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)

Promotora de Partes Electronicos Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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STATEMENT OF THE CASE

On April 16, 1982, while working at GM's Oldsmobile plant in Lansing, Michigan, Petitioner took a shotgun from his car in the company parking lot and shot an employee with whom he had a dispute. Mr. Burke shot the employee a number of times, and was later himself shot by police officers who were summoned to the plant. At the time of this incident, Mr. Burke was working a reg-

ular schedule for General Motors. He was not on leave, nor had he requested a leave for disability or any other reason.

Petitioner was a member of the bargaining unit represented by defendant Local 652 of the United Auto Workers ("UAW"). Mr. Burke's terms and conditions of employment were governed by a labor contract and related agreements negotiated between GM and the UAW. Under the labor contract, GM is allowed to discharge any employee for "cause". (UAW Agreement, ¶ 8, Exhibit 1 to the Deposition of James Sickles.) After interviewing Mr. Burke and obtaining other information about the April 16 shooting incident, GM determined that Mr. Burke's conduct on that date was "cause" for discharge under the labor agreement. He was immediately suspended. After further review, he was discharged in July, 1982, for violating a work rule prohibiting bringing weapons onto company property.

The GM-UAW Agreement contains a grievance procedure available to employees who dispute GM discipline decisions. (UAW Agreement, ¶¶ 28-55, Exhibit 1 to the Deposition of James Sickles.) Mr. Burke had utilized this grievance procedure in the past. After his suspension, Mr. Burke took advantage of this procedure, filing a grievance with the UAW. The grievance procedure culminates in binding arbitration. In Petitioner's case, the UAW determined prior to arbitration that it could not successfully challenge Mr. Burke's discharge. (Sickles Deposition at pp. 15-16.) It therefore withdrew Mr. Burke's grievance. (Sickles Deposition at pp. 6, 11.)

Petitioner was incarcerated following the April 16 shooting incident. He was charged with assault with intent to commit murder, but was acquitted by reason of insanity.

In deciding that an arbitration would not be successful, the union fully considered what it then knew about Mr. Burke's mental condition. Shop Committeeman James Sickles described the union's judgment that Petitioner's mental state would not be an adequate defense to his discharge as follows:

> Q: In your judgment, would the outcome of the criminal case have any relevance as to the merits of the grievance?
>
> A: No, that — the criminal case was a separate issue to me. It had no relevance whatsoever in my determination, or it wouldn't have had. And it still today wouldn't have had.
>
> Q: In your judgment, did Mr. Burke's mental condition have any relevance to the outcome of the grievance?
>
> A: No, it did not.
>
> Q: Why doesn't the mental condition have any relevance?
>
> A: The fact still remains, whether he was mentally competent or mentally incompetent, he was still in possession of a lethal weapon on company property. That is what he was charged with and he was guilty of that infraction.

(Deposition of James Sickles, p. 11.)

The record confirms that Petitioner's mental condition at no time interfered with his full understanding of his discharge by GM, of the union's decision that it could not overturn the discharge, or of the criminal proceedings against him. For example, Mr. Burke confirmed at his deposition that:

1. He fully understood his suspension by GM shortly after the April 16 shooting, and fully understood

that GM was considering terminating his employment (Burke Deposition at pp. 33, 34.);

2. He fully understood that GM believed he had violated the rule against bringing firearms onto company property, and agreed that he had violated the rule (Burke Deposition at p. 34.);

3. He fully understood his discharge by GM in July, 1982, and knew why he had been fired (Burke Deposition at pp. 34, 35.);

4. He knew, no later than July, 1982, that the union's position on his discharge was that it could do nothing about it, and that the union "could protest, but it wouldn't do any good" (Burke Deposition at pp. 20, 22, 25, 37, 40, 47, 49.);

5. He has never had a guardian appointed for him (Burke Deposition at p. 19.);

6. He was found fully competent to stand trial on his criminal charge, and to assist in his own defense (Burke Deposition at p. 17.);

7. He considered immediate legal action against GM, but decided against it because he did not want to return to Oldsmobile and because he had "more important things to take care of" than his discharge; he decided to address GM *after* criminal matters were finished (Burke Deposition at pp. 19, 20, 23, 25, 39, 43.);

8. He discussed his discharge by GM with at least two lawyers during the spring or summer of 1982. (Burke Deposition at pp. 22-23, 40.)

Finally, during the grievance process Petitioner at no time told GM or union representatives that he felt he had not violated GM's weapons rule. He never told GM

or the union that he felt the rule violation should be excused because of his mental condition. He never asked the union to challenge his suspension or discharge for that reason.

General Motors heard nothing from Petitioner or anyone on his behalf between the time of his discharge and January, 1985. At that time, Mr. Burke's current attorney wrote GM regarding Mr. Burke's eligibility for disability insurance benefits. The present lawsuit was filed shortly thereafter in March, 1985.

REASONS FOR DENYING THE WRIT

I.

THE RULING OF THE SIXTH CIRCUIT THAT THE UNION DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION BY WITHDRAWING PETITIONER'S DISCHARGE GRIEVANCE IS CORRECT UNDER THIS COURT'S CONTROLLING LAW, AND IS NOT INCONSISTENT WITH THE LAW OF ANY OTHER CIRCUIT.

A union's duty of fair representation has been fashioned by this Court because of the union's power as the exclusive representative of its members. *See e.g., Steele* v *Louisville & Nashville R. Co,* 323 US 192 (1944); *Ford Motor Co* v *Huffman,* 345 US 330 (1953). The union has the duty of representing the interests of all employees "fairly, impartially and in good faith". *Steele,* 323 US at 203. A union can fairly represent all of its members as their exclusive representative even though various members may have a conflict of interest as to the outcome of a particular matter. *Humphrey* v *Moore,* 375 US 335, 350 (1964).

The controlling standard is contained in *Vaca* v *Sipes,* 386 US 171, 190 (1967), where this Court held:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining union is arbitrary, discriminatory or in bad faith.

This Court also stated in *Vaca* that an individual employee did *not* have an absolute right to have his grievance taken to arbitration. *Id* at 191. It recognized that taking every case to arbitration would undermine the parties' contractual settlement machinery, destroy the employer's confidence in the union's authority, and significantly increase the number of arbitrations and the cost of the contractual grievance process. Accordingly, this Court realized that a union must be permitted a "wide range of reasonableness . . . in serving the unit it represents". *Huffman*, 345 US at 338.

The reason why the union withdrew Petitioner's grievance in this case is undisputed. The union withdrew the grievance protesting Petitioner's discharge because it did not believe it could prevail, under the circumstances, in arbitration. The union had conducted an investigation, and had all the essential facts. Petitioner had admitted that he had brought a shotgun onto company property. He admitted that what he did was a violation of GM's work rules. The union realized the rule existed precisely to avoid the kind of tragic misconduct that occurred on April 16. It also realized that discharge was an appropriate penalty for what Mr. Burke had done. Finally, Petitioner himself had not claimed that his admitted rule violation should be excused because of his mental condition. His only response to GM's position was to admit the misconduct and state that he was sorry.

Petitioner has cited no authority that the UAW's decision, on the above facts, violates *Vaca*. To the contrary, it clearly does not.

The only case cited by Petitioner supporting a claimed conflict with other circuits is *Carpenter* v *West Virginia Flat Glass, Inc.*, 763 F2d 672 (1985). *Carpenter* is completely different from the instant case. There, the central issue raised by the employee's grievance was his physical ability to work. The parties had agreed to rely on the opinion of a third physician. The doctor's report did not specifically address the physical ability of the grievant to work. The union did not request clarification of that opinion, and withdrew the grievance. The Fourth Circuit properly found arbitrary under *Vaca* the failure of the union to ask the key question of the key witness in the grievance.

Nothing remotely similar is involved here. The Petition incorrectly states that:

> As in *Carpenter*, petitioner's health was the issue for the union and the company to resolve in determining whether petitioner should be discharged. . . .

(Petitioner's brief, p. 10.)

This is nonsense. The issue before the union was whether Petitioner violated GM's weapons rule. A violation of that rule was known by the union, the company and Petitioner to be proper grounds for discharge. The union made the judgment that Petitioner's existing mental state would not excuse that violation. Petitioner's health was *never* raised as an issue by him until years after the Petitioner's discharge. No medical or psychological examinations were made or requested by anyone.

Therefore, *Carpenter* is irrelevant to the instant Petition. The Sixth Circuit's ruling in the present case conflicts with no rulings of any other circuit.

In withdrawing Petitioner's grievance in this case, the UAW acted well within this "wide range of reasonable-

ness" recognized as necessary by this Court. Mr. Burke shot a co-worker on company premises. This violation of company work rules was "cause" for his discharge under the collective bargaining agreement. Whether or not Mr. Burke was, months later, acquitted by reason of insanity under the laws of a particular state is absolutely irrelevant in the collective bargaining context. The state has entirely different purposes in permitting an insanity defense than an employer and union do in agreeing upon rules governing the workplace. The state permits an insanity defense because it only desires to punish those who are morally culpable. By contrast, an employer and union are interested in providing a safe, efficient and productive working environment for both management and employees. The "law of the shop" can achieve these goals only if known, reasonable standards are uniformly applied in accordance with the terms of the collective bargaining agreement.

What Petitioner seeks in this case is a restriction on union grievance processes which is totally contrary to the principles established by this Court. Petitioner wants this Court to require unions to raise and arbitrate a mental impairment defense to employee discipline and discharge, or violate the duty of fair representation. This defense would have to be raised by the union *on its own*, regardless of any such claim by the employee, whenever the union knows facts which might indicate unstable or anti-social behavior by the employee.

The restriction advocated by Petitioner is contrary to basic principles of federal labor law. It would obviously require psychological examinations. It would involve unpredictable delays in resolution of grievances. Requiring arbitration of such issues would burden settlement of such disputes with a high risk of litigation. Petitioner's position is therefore completely at odds with this Court's

requirement that federal labor law promote the timely and efficient resolution of labor disputes. It should be rejected by this Court.

II.

PETITIONER CITES NO AUTHORITY, MUCH LESS A CONFLICT AMONG THE CIRCUITS, FOR HIS CLAIM THAT THE DUTY OF FAIR REPRESENTATION REQUIRES A UNION TO DEMAND DISABILITY STATUS FOR A DISCHARGED EMPLOYEE WHO ADMITTEDLY VIOLATED A WORK RULE, BUT WHO SHOWS SIGNS OF MENTAL INSTABILITY.

This part of Petitioner's argument is again a request for a major restriction on grievance processes. Petitioner cites no authority for his proposition. He has shown no conflict among the circuits on the question he seeks the Court to reach.

This argument is merely another effort by Petitioner's counsel, years after the fact, to second-guess the union's handling of Petitioner's grievance. For the following reasons, this claim is wholly without merit.

Under the collective bargaining agreement between GM and the UAW, the union could oppose Petitioner's discharge only if that discharge violated the labor contract. The Petitioner suggests that the UAW should have argued that instead of discharging Mr. Burke, GM should have placed him on disability leave. There is absolutely no basis in the collective bargaining agreement for such an argument by the union.

The fact that GM did not, on its own initiative, place Mr. Burke on disability leave cannot possibly be viewed as a violation of the collective bargaining agreement. Disability leave, for physical and mental reasons, is available under the contract. Under agreed-upon procedures, that leave is to be requested by the employee in-

volved, and be supported by medical proof of the employee's mental or physical condition. There is no contractual provision allowing GM to unilaterally take such action.

Therefore it would have been fruitless for the union to argue that GM had violated the labor agreement by not placing Mr. Burke on disability leave. Because such a claim is not even an arguable violation of the labor contract, it is hardly a breach of duty of fair representation for the union not to take such a claim to arbitration. The union's withdrawal of Petitioner's grievance, rather than arbitrating whether he should have been placed on disability leave, cannot be arbitrary, discriminatory or bad faith conduct.

CONCLUSION

For the above reason, the Petition for Certiorari should be denied.

Respectfully submitted,

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Dated: April 23, 1987

(3)

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UAW RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

COUNTER-STATEMENT OF THE ISSUE

DOES A UNION VIOLATE ITS DUTY TO FAIRLY REPRESENT A MEMBER WHEN THE UNION MAKES A GOOD FAITH DETERMINATION NOT TO DEFEND THE MEMBER'S CONDUCT — BRINGING A SHOTGUN ONTO COMPANY PROPERTY AND SHOOTING A CO-WORKER — ON THE GROUND OF MENTAL ILLNESS?

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CASES:

No. 86-1578

In The

Supreme Court of the United States

October Term, 1986

JAMES BURKE,
by and through his next Friend, Betty Draves,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA and UAW LOCAL 652,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UAW RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Petitioner James Burke was employed by Respondent General Motors Corporation and represented for purposes of collective bargaining by Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 652 (hereafter collectively "Union" or "UAW").

On April 16, 1982, Petitioner shot and injured a co-worker in the parking lot of General Motors' Oldsmobile plant in Lansing, Michigan. App. B-3. Police officers responding to the incident shot and wounded Petitioner.[1] *Id.*

On June 11, 1982, after Petitioner had recovered from his wounds, General Motors put Petitioner on "indefinite suspension." On that same day, Respondent UAW filed a grievance on Petitioner's behalf protesting his suspension. On July 14, Petitioner was discharged for violating the General Motors work rule against bringing weapons onto Company property.

The Local UAW officials responsible for Petitioner's district accompanied two General Motors supervisory employees on a visit to Petitioner at the Ingham County Jail shortly after the incident. Petitioner was informed by the General Motors officials at that time of his suspension. The UAW official spoke to Petitioner at that time and obtained his signature on a grievance form as required by the UAW/GM contract.[2]

The UAW official then presented and defended Petitioner's grievance at the first step in the contractual grievance procedure. General Motors denied Petitioner's grievance at Step One. The grievance was then turned over to the shop committeeperson, a union official with

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[1] Petitioner was tried on criminal charges of assault with intent to murder and was found not guilty by reason of insanity. As a result of these criminal charges, Petitioner was committed to a Center of Forensic Psychiatry and was ultimately institutionalized for nearly two and one-half years. *Id.* at B-3.

[2] As Petitioner noted below, the grievance form was not yet filled in when signed by Petitioner. As the District Court found, however, there is nothing untoward about this fact; the language on grievance forms is formulaic and such forms are often signed following the initial discussion with the union representative but prior to their actually being filled out. App. B-6.

jurisdiction over Step Two of the contractual grievance procedure. The shop committeeperson discussed the grievance with the chair of the Shop Committee and with officials of the International Union's General Motors Department, individuals charged with providing interpretations of the national UAW/GM collective bargaining agreement. App. B-4. Following these discussions, the district committeeperson concluded that, "as long as General Motors had proof that [Petitioner] was seen with the gun [on General Motors' property], the discharge would be upheld." App. B-5. Because there was no doubt that such proof was available, the district committeeperson recommended to the Shop Committee that the grievance "be withdrawn because it was unwinnable." App. B-4. The Committee accepted this recommendation and the grievance was withdrawn on July 30, 1982.

The Union notified Petitioner's wife of the decision to withdraw Petitioner's grievance in August of 1982.[3] In 1984, Petitioner filed his Complaint.

Petitioner's Complaint alleged that his suspension and discharge were in violation of the collective bargaining agreement,[4] that the Union failed to fairly represent Petitioner in the grievance procedure, and that both General Motors and the Union had discriminated against Petitioner on the basis of handicap. Petitioner argued

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[3] Petitioner argued below that the failure to notify him personally of the decision to withdraw the grievance was a violation of the Union's duty of fair representation. As the District Court explicitly found, however, the Union presented uncontradicted testimony that it did not know where Petitioner was being held at the time the Committee decided to withdraw the grievance. Given the circumstances, the District Court concluded that the Union adequately discharged its duty by notifying Petitioner's wife.

[4] The collective bargaining agreement allows discharge only for "just cause."

primarily that his mental illness excused his violation of the General Motors work rule prohibiting firearms on Company property and that the Union breached its duty to Petitioner by not attempting to defend his conduct on the basis of his mental condition.

Following discovery, the Union and General Motors moved for summary judgment on several grounds.[5] The District Court granted the motions. The Court found that Petitioner had failed to introduce any evidence demonstrating arbitrary, discriminatory or bad faith conduct on the part of the Union, and had therefore failed to state a claim for breach of the duty of fair representation. The Court therefore also dismissed the breach of contract claim against GM under *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967) and *Republic Steel* v. *Maddox*, 379 U.S. 650 (1956).[6] Having dismissed all of Petitioner's federal law claims, the District Court found that it was unable to exercise pendent jurisdiction over Petitioner's remaining state law handicap discrimination counts. App. B-9.

In a short *per curiam* opinion, the Sixth Circuit affirmed the District Court's decision in all respects. App. A-1.

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[5] Both the Union and General Motors argued that dismissal was required because Petitioner's Complaint was time-barred, because Petitioner had failed to exhaust his internal union avenues of appeal, and because Petitioner had failed to state a claim under the duty of fair representation, among other defenses.

[6] The District Court also dismissed Petitioner's claim under the Federal Rehabilitation Act because of Petitioner's failure to exhaust his administrative remedies. App. B-8.

REASONS FOR DENYING THE WRIT

Petitioner has presented a single issue for review: whether a union breaches its duty of fair representation by failing to pursue a grievance in which the only conceivable defense is that the employee's mental illness should excuse his bringing a weapon onto Company property and shooting a fellow employee. The Local Union, after consulting with representatives of the International Union responsible for providing interpretations of the national GM/UAW agreement, concluded that Petitioner's grievance was "unwinnable" and therefore decided to withdraw the grievance. Petitioner alleged no specific facts evidencing an arbitrary, hostile, or discriminatory motive on the part of the Union. As we will show in Part I, the Court below was correct in concluding that the Union acted well within the range of its discretion in deciding to withdraw Petitioner's grievance. Moreover, as we show in Part II, there is no conflict of lower court authority on this topic. In sum, nothing presented by this case requires review by this Court.

I.

THE UNION DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION.

The scope of the duty of fair representation is by now well-established. As the Court stated in *Vaca* v. *Sipes*, 386 U.S. 170, 171 (1967):

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

In *Vaca*, the Court also reaffirmed the principle that an individual employee does not have an absolute right to

have his grievance taken to arbitration. *Vaca* v. *Sipes*, 191. Rather, in administering the grievance and arbitration machinery, a union is required to make decisions as to the merits of particular grievances and how to pursue them. As the Court in *Vaca* recognized, the union's discretion in making these determinations is limited only by its duty to administer the grievance machinery without conduct which is either arbitrary, discriminatory or in bad faith.

In the present case, Petitioner violated General Motors' rule against bringing weapons onto Company property. No evidence was presented that General Motors has ever allowed exceptions to this rule or that the rule is anything but universally applied.

After consulting with union officials responsible for administration of the national UAW/GM Agreement, the shop committeeperson at Petitioner's plant concluded that Petitioner's grievance was "unwinnable" and therefore recommended withdrawal of the grievance. Petitioner's union representatives — by then well aware of Petitioner's mental condition — simply concluded, in the good faith exercise of their judgment, that a mental illness defense would not render Petitioner's grievance winnable. App. B-3.

Throughout the proceedings below, Petitioner introduced *no evidence* that the decision to withdraw his grievance was for any reason other than the Union's good faith judgment that insanity would not create an exception to the work rule at issue. The failure to raise insanity as a defense to a violation of the employer's rule against weapons on Company property is not "arbitrary, discriminatory, or bad faith handling" of a grievance. Instead, the Union's decision not to pursue such

an argument is clearly within the Union's discretion under *Vaca*.[7]

Even putting aside the merit — or lack thereof — of the mental illness defense which Petitioner believes should have been raised during the course of his grievance, a union's failure to raise a particular argument in pursuing a grievance does not, without more, rise to the level of a breach of the duty of fair representation. Without evidence that failure to raise such an argument was based on a hostile, discriminatory or bad faith motive, such failure amounts to merely negligent conduct. As the Court below found, "[m]ere negligence is insufficient to establish a breach of the duty of fair representation." [Citing *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 310-11 (6th Cir. 1975)] Further, as the District Court explicitly noted, "a decision to rely on one theory of the case as opposed to another is not arbitrary." [Citing *Poole* v. *Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983)]

Finally, no breach of the duty is presented by the Union's failure to further investigate Petitioner's mental condition. In making their determination, the union officials *assumed* that Petitioner indeed suffered a debilitating mental condition, but concluded that an insanity defense — even if supported by adequate medical evidence — could simply not prevail.

In sum, as the Courts below properly held, the Union's good faith decision not to raise mental illness as

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[7] Petitioner has argued that his obtaining a verdict of "not guilty by reason of insanity" on the criminal charges filed as a result of this incident demonstrates the validity of his position and the merit of his grievance. Obviously, General Motors is free to discharge employees even for conduct for which the individual would not be criminally liable because of insanity. Indeed, the suggestion that a contractual "just cause" limitation on discharges should include a *mens rea* requirement or an insanity defense is a novel one.

a defense to a very serious infraction of Company rules — no matter the actual mental state of the grievant — does not constitute a breach of the duty of fair representation.

II.

THERE IS NO CONFLICT OF LOWER COURT AUTHORITY ON THE ISSUE PRESENTED HERE.

Petitioner cites no precedent for his claim that the Union breaches its duty of fair representation when it fails to accommodate an alleged mental illness by defending a discharge on that basis. The case referred to by Petitioner as in conflict with the decision below deals with a different situation altogether.

In *Carpenter* v. *West Virginia Flat Glass,* 763 F.2d 622 (4th Cir. 1985), an employee experienced an on-the-job injury resulting in inability to perform certain work-related tasks. The employee produced a medical report from his personal physician indicating that he could perform no work except "light duty." After the employer indicated that no "light duty" work was available, the employee obtained a "no duty" report from his physician. The employer then asked the employee to submit to an examination by a physician selected by the company. The employer's physician submitted a report which was inconclusive as to the type of work which the employee could perform. The employer, however, interpreted their physician's report to mean that the employee was medically able to perform his duties. When the employee refused, he was discharged by the company.

The union filed and processed a grievance on the employee's behalf. The grievance was resolved by a mutual agreement that a neutral physician would be

established and that both parties would be bound by his or her conclusion. When the neutral physician submitted a medical report mirroring the language of the employer's physician, and similarly inconclusive as to the extent of work which the employee could perform, the union apparently assented to the company's discharge. The court found that the union's failure to request a more definitive report from the neutral physician demonstrated "perfunctory" handling of the grievance to such an extent that it amounted to arbitrary conduct under *Vaca*.

The difference between *Carpenter* and the present case is apparent. In *Carpenter*, the extent of the disability was the crucial issue to be determined in the grievance procedure. By failing to obtain a sufficiently dispositive medical opinion, then, the union breached its duty of fair representation. In the present case, however, the discharge was not based on medical judgment. Instead, the discharge was based on Petitioner's admittedly violating Company rules by bringing a shotgun onto Company premises and shooting a co-employee. The Union concluded that, *whatever* Petitioner's medical condition, such medical condition would not render a grievance over his discharge "winnable." In the present case, therefore, there is no medical dispute to be resolved, and no breach of the duty in the Union's failure to develop a more complete medical picture of Petitioner's mental condition.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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